STATE OF MICHIGAN

COURT OF APPEALS

JOHN PETER FRIELING,

Plaintiff-Appellee,

v

KIMBERLY ANN FRIELING,

Defendant-Appellant.

UNPUBLISHED
April 29, 2003

No. 233276
Genesee Circuit Court
LC No. 99-210305-DM

Before: Hoekstra, P.J., and Bandstra and Saad, JJ.

PER CURIAM.

Defendant appeals as of right the judgment of divorce, raising issues pertaining to the division of property, child support, parenting time, and the trial court's failure to award defendant attorney fees. Defendant also requests that the trial judge be disqualified from presiding over any further proceedings in this matter. We affirm the judgment of divorce and decline defendant's request that the trial judge be disqualified.

I. Property Division

Plaintiff first argues that the trial court's use of varying dates to value the parties' retirement accounts resulted in an unfair and inequitable property division. Specifically, plaintiff asserts that the figure used by the court to value plaintiff's Supplemental Retirement Savings Program (SRSP) account represents the value of that account as of January 1999, while the figures used to value defendant's retirement accounts represents their value as of March 2000.[1] Plaintiff further asserts that the inequity of this error was compounded by the trial court's erroneous approximation of the parties' equal share of equity in the marital home at $35,000, after agreeing on reconsideration that the true equity in the home was $62,350, rather than the

[1] Although not expressly argued by defendant in her brief on appeal, it appears that the "unfair and inequitable" property division alleged by defendant rests upon the premise that, while her retirement accounts were worth less in January 1999, plaintiff's account was worth more in March 2000. Therefore, although intending to order an equal split of the marital estate by permitting defendant to retain all equity in the marital home and awarding plaintiff the full value of his SRSP account, the trial court, in effect, awarded plaintiff a greater share of the marital estate.

$70,000 originally concluded by the court. Plaintiff argues that these errors, as well as the trial court's failure to make specific findings of fact regarding the factors set forth in *Sparks v Sparks*, 440 Mich 141, 159-160; 485 NW2d 893 (1992), require that the judgment of divorce be reversed. We disagree.

Initially, we note that a trial court is afforded broad discretion in choosing the date on which to value a particular marital asset. See *Byington v Byington*, 224 Mich App 103, 114, n 4; 568 NW2d 141 (1997). In the instant case, the trial court indicated that its use of a later date to value defendant's retirement accounts stemmed from defendant's failure to provide documentation to support valuation at an earlier date. Therefore, because there is no indication that defendant in fact supplied such documentation, we find no abuse of discretion in the trial court's choice of valuation dates for those assets.

Moreover, even assuming that the trial court did abuse its discretion in using varying dates to value the parties' pension accounts, because the ultimate disposition of these assets was both fair and equitable, defendant is entitled to no relief on this issue. See *Ackerman v Ackerman*, 163 Mich App 796, 807; 414 NW2d 919 (1987) (the goal of distributing marital assets in a divorce proceeding is to reach a "fair and equitable distribution in light of all the circumstances"); see also *Hanaway v Hanaway*, 208 Mich App 278, 292; 527 NW2d 792 (1995) (this Court will not disturb a trial court's property disposition rulings unless it is left with "the firm conviction that the distribution was inequitable").

To begin with, we find no error in the trial court's choice of January 1, 1999, as the date on which to value the assets at issue here, including plaintiff's SRSP account. Throughout the proceedings in this matter the trial court appears to have wavered between valuing the parties' assets either at the time of trial or as of the date plaintiff filed his complaint. Although the trial court's reasons for choosing the latter of these dates is not clear, the choice was, nonetheless, within the court's discretion and there is nothing on this record to indicate that its choice was an abuse of that discretion. *Byington*, *supra*. Although defendant asserts that use of that date was inequitable given plaintiff's failure to comply with the trial court's request for evidence regarding the value of the SRSP account at the time of trial, the record submitted to this Court on appeal bears no evidence to show that the requested documentation was not supplied to the trial court prior to its initial decision on property disposition. To the contrary, in its opinion regarding defendant's second motion for reconsideration the trial court specifically stated that it had been given the requested values by the parties' attorneys and had used those values in determining an appropriate disposition. Relying on these values as shown in the lower court record, we find the disposition of property to be equitable.

In its final order of divorce the trial court awarded defendant, in relevant part, the marital home, all rights in her retirement accounts, and fifty-percent of the value of plaintiff's pension through Hudson's department store. In exchange for these assets, plaintiff was awarded all rights in his SRSP account, "free and clear of any claim" by defendant.[2] According to defendant, the

[2] That the trial court intended this award to offset defendant's award of the marital home was made clear in its written opinions regarding property division.

value of her pension accounts as of January 1, 1999, was $5865.[3] Regarding the value of the remainder of the assets at issue, the parties stipulated to equity in the marital home of approximately $62,350 and defendant does not dispute that plaintiff's SRSP account held a value of approximately $68,023 on January 1, 1999. Thus, with respect to the specific assets at issue here, when viewed as of January 1, 1999, defendant was awarded property totaling $68,215, while plaintiff received $68,023 in marital assets. Accordingly, because the ultimate disposition of these assets was nearly equal and, in fact, slightly more favorable to defendant, we will not disturb the trial court's ruling with respect to division of these assets.[4] *Ackerman*, *supra*; *Hanaway*, *supra*.

In reaching this conclusion, we reject defendant's assertion that reversal is required because the trial court failed to consider the factors set forth in *Sparks*, *supra*, when dividing the marital estate.[5] Initially, we note that defendant did not raise this argument in her statement of questions presented as required by MCR 7.212(C)(5). Appellate review of this claim is, therefore, inappropriate. See *In re BKD*, 246 Mich App 212, 218; 631 NW2d 353 (2001). Nonetheless, as argued by plaintiff, the trial court is given broad discretion in fashioning its dispositional ruling and is only required to consider those factors relevant to the case before it. *Sands v Sands*, 442 Mich 30, 34-35; 497 NW2d 493 (1993). Here, the parties' positions being equal on all other factors, the trial court satisfied its obligation under *Sparks* by expressly considering, in its written opinion of December 6, 2000, the only factor of relevance to disposition of the marital estate, i.e., fault. There, the trial court opined:

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[3] Because defendant had not yet acquired the smaller of her two pension accounts as of January 1, 1999, the trial court did not include the value of the $2005 account as part of the marital estate. Accordingly, we do not consider the value of that account for purposes of determining whether the overall disposition here was equitable.

[4] Contrary to defendant's contention, the trial court did not also "erase" plaintiff's child support arrearage "in full." Although in its original opinion regarding property division the trial court did "waive" the entirety of plaintiff's $3030 arrearage in order to "balance the marital estate distribution," the court later modified the award to grant plaintiff a credit of only $1410 toward this arrearage, based on the support paid by plaintiff for the parties' eldest daughter after she reached the age of majority. While this award would seemingly alter the equity of the division here, we note that the credit awarded plaintiff was, at its root, simply a return of monies paid to defendant to which she was not legally entitled. Moreover, in addition to the assets specifically at issue here, defendant received a number of household items specifically requested by plaintiff, while plaintiff was awarded only those personal items left by him in the marital home. In any event, a division of property need not be mathematically equal to be equitable. See *Byington*, *supra* at 114-115.

[5] In *Sparks*, our Supreme Court held that to reach an equitable division, a trial court should consider the duration of the marriage, contributions of the parties to the marital estate, age of the parties, health of the parties, life status of the parties, necessities and circumstances of the parties, earning abilities of the parties, past relations and conduct of the parties, and general principles of equity. *Id*. at 159-160.

> The Defendant has requested that this Court should look at fault in determining the allocation of attorney fees. This Court, in this opinion, has already considered fault in granting the division of marital property. For example, the Defendant was granted sole possession of the marital home with no direct payment being made to the Plaintiff for his share of the equity. Therefore, the Plaintiff is left with no source of funds from this divorce judgment to purchase a new home. Rather, the Plaintiff is left to his retirement accounts with the possible tax liability and his present employment for such funds. The Defendant was also awarded the comic books with no credit being given to the Plaintiff. Further, the defendant was awarded the snow blower, the dining room furniture, and the dry sink, which the Plaintiff requested without any credit being given to the Defendant. Fault was taken into consideration when these property divisions were made. Therefore, each party shall pay his or her own attorney fees including any fees incurred from any previous attorney for the party.

Given these comments by the trial court, we would not disturb the trial court's dispositional ruling even had the issue been properly preserved for our consideration.

II. Child Support

Defendant next argues that the trial court's failure to enforce its orders regarding production of financial documents resulted in an incorrect determination of plaintiff's child support obligation and associated arrearage. As explained below, however, because defendant failed to adequately raise and argue this issue below, the record does not provide the facts necessary to properly review this issue.

Shortly after plaintiff filed the complaint in this matter, the trial court entered a number of orders requiring that the parties provide one another with various income information within a short period of time after commencement of this suit. On appeal, defendant asserts that plaintiff refused to abide by these orders and failed to timely provide her with the relevant income information, thereby distorting his income for purposes of determining his child support obligation. More specifically, defendant asserts that although plaintiff initially provided information pertaining to his 1999 income, he failed to supply that regarding his 1998 income, which was somewhat higher than in 1999, until January 10, 2000.[6] Defendant argues that plaintiff's conduct in this regard was a deliberate attempt to minimize his income for purposes of determining child support, and asserts that the trial court is at fault for the alleged errors in calculating child support because it failed to enforce the orders noted above.[7]

Initially, we note that although defendant is correct that the trial court used the lower 1999 income to determine child support in its November 6, 2000 opinion, defendant had, at that

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[6] Plaintiff was required to turn over that information by March 16, 1999.

[7] The errors alleged stem from defendant's claim that the trial court was required, under MCL 552.502(g), to use the higher 1998 income to determine plaintiff's support obligation. While we question the merit of defendant's argument in this regard, as explained below, we need not address the argument because the record is not sufficient for any meaningful review.

time, already received the subject documentation and yet failed to raise any objection to the trial court's use of the later income information in either of her two motions for reconsideration or in her written objections to the judgment of divorce originally entered in this matter. Defendant similarly failed at any time below to formally request that the trial court enforce the discovery and production orders quoted above. Accordingly, the trial court was never afforded an opportunity to address these matters and defendant's challenge to its calculation of plaintiff's support obligation is, therefore, not preserved for appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (issues not raised before and decided by the trial court are not preserved for appeal). Moreover, although this Court will generally disregard preservation requirements where review is necessary to a proper determination of the case, *Herald Co v Kalamazoo*, 229 Mich App 376, 390; 581 NW2d 295 (1998), we decline to do so here. Indeed, the purpose of appellate preservation requirements is to induce litigants to do everything they can in the trial court to prevent error, eliminate its prejudice, or at least make a record of the error and its prejudice for appellate review. See *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). Here, without the benefit of evidence, arguments, and findings of fact from the trial court, we cannot discern the extent of the trial court's error, if any, in determining plaintiff's child support obligation. Accordingly, given that the inadequacy of the record is directly attributable to defendant's failure to raise and properly preserve this issue below, we decline to review this issue further. See, e.g., *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992); see also *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993) (an appellant generally bears the burden of furnishing the reviewing court with a record that "verifies the basis of any argument on which reversal or other claim for appellate relief is predicated").

For these same reasons, we are unable to meaningfully review defendant's claim that the 1999 income figures relied on by the trial court improperly excluded retirement contributions made by plaintiff, and did not reflect plaintiff's "true earnings ability." Again, defendant failed to raise any objection below, leaving this Court without a record adequate for meaningful review. Although defendant has presented documentation allegedly supporting this assertion, it is not part of the lower court record properly reviewed by this Court, and such evidence alone is insufficient, in any event, to correctly determine plaintiff's support obligation. See *Reeves v Kmart Corp*, 229 Mich App 466, 481, n 7; 582 NW2d 841 (1998) (a party may not expand the record on appeal, as this Court's review is limited to the record established by the trial court).[8] Defendant's claim that the plaintiff's support arrearage was incorrectly calculated on the basis of these errors and that plaintiff's counsel, knowing this, violated MRPC 8.4 by preparing and presenting a judgment of divorce premised on the allegedly erroneous calculations, similarly evades any meaningful review for lack of an adequate record. Defendant's failure to raise and

[8] In support of her assertions, defendant has appended to her appellate brief those copies of plaintiff's 1998 and 1999 W-2s allegedly provided to her in January 2000. These documents were never formally admitted at trial and it is unclear whether they were ever presented to or considered by the trial court. Moreover, in its November 6, 2000 opinion, the trial court indicated that it relied on the parties' 1999 tax returns to determine plaintiff's child support obligation. These documents, however, are not found in the record presented on appeal or as attachments to the parties' briefs.

preserve these issues has left a record devoid of any evidence to support the claimed errors. Accordingly, we decline to review these issues as well. *Adam*, *supra*.

III. Parenting Time Restrictions

Defendant next argues that the trial court erred in failing to consider the best interests of the parties' minor child before refusing to grant defendant's request that the judgment of divorce include a "prohibition against either party having unrelated adult members of the opposite sex present overnight while the minor child is present." Again, we disagree.

Child custody disputes, including those concerning restrictions on parenting time, are governed by the Child Custody Act, MCL 722.21 *et seq*. In relevant part, MCL 722.27a(1) states that parenting time "shall be granted in accordance with the best interests of the child." Thus, defendant is correct that the controlling factor in determining the terms and conditions by which parenting time is to be exercised is the best interests of the child. See, e.g., *Deal v Deal*, 197 Mich App 739, 742; 496 NW2d 403 (1993). Here, however, the trial court did not neglect its obligation to consider the best interests of the child in denying defendant's request for the subject restriction. Rather, in denying defendant's request, the trial court noted that the issue had not been previously raised and invited defendant to file a motion addressing whether such a prohibition was in fact in the best interests of the child. Defendant, however, failed to accept this invitation. Accordingly, because custody and the terms of visitation were not otherwise disputed by the parties, the trial court did not err in failing to address the best interests of the child in the absence of any further action by defendant. Moreover, given defendant's failure to take such action, she should not now be heard to complain of the absence of the subject restriction in the judgment of divorce.

In reaching this conclusion, we note that, contrary to defendant's assertion, MCL 722.27a(7), which states that "[p]arenting time shall be granted in specific terms if requested by either party at any time," did not require that the trial court include the subject restriction merely because it was requested by defendant. It is clear that this subsection simply requires that the trial court, when requested, set forth the terms of parenting time in detail. To read the statute as suggested by defendant would require that any requested condition, no matter how peculiar or unnecessary, be granted. Such a reading is inconsistent with both the rules of statutory construction and the ultimate objective of ensuring that parenting time be granted and administered in a manner consistent with the best interests of the child. MCL 722.27a(1); see also *Fletcher v Fletcher*, 447 Mich 871, 880; 526 NW2d 889 (1994) (statutes should be construed so as to prevent absurd or unreasonable results).

IV. Attorney Fees

Defendant next argues that the trial court abused its discretion by failing to award her attorney fees incurred during the divorce proceedings. We disagree.

There is no right to the recovery of attorney fees in a divorce action. *Kurz v Kurz*, 178 Mich App 284, 297; 443 NW2d 782 (1989). Generally, an award of reasonable attorney fees is authorized when one party is unable to bear the expense of the litigation and the other party has the ability to pay. See *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). However, attorney fees may also be authorized when the requesting party has been forced to

incur expenses as a result of the other party's unreasonable conduct in the course of litigation. *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992). This Court will not reverse the trial court's decision regarding attorney fees absent an abuse of discretion. *Stoudemire v Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). An abuse of discretion will be found only where the result is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Spaulding v Spaulding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959). Here, we find no such abuse of the discretion afforded the trial court in determining whether attorney fees were appropriate.

Defendant, as the party seeking to recover attorney fees, was required to allege facts sufficient to show both that she was not in a position to bear the expense of the action and that plaintiff had the ability to pay. *Kosch*, *supra*. Defendant, however, presented no evidence at trial to support the amount of her attorney fees, and similarly failed to show that plaintiff would be financially able to bear such an expense while she could not. The parties' incomes at the time of trial were both relatively modest. Defendant testified at trial that her 1999 income after retirement contributions was approximately $37,000. Plaintiff testified that during that same time period he earned somewhat less than defendant; specifically, $33,000. Although plaintiff did indicate at trial that he hoped to earn more at his new job selling furniture than he had in previous years, the $40,000 to $45,000 in commissions speculated by him to be possible hardly equates to the "superior financial position" to afford the $15,000 in attorney fees alleged by defendant. Moreover, in *Hanaway*, *supra* at 299, this Court indicated that if a trial court's award of property leaves the parties with assets and income comparable to one another, an award of attorney fees is inappropriate. As previously explained, the marital assets at issue in this case were fairly evenly divided by the trial court. At trial, defendant agreed that the personal property ultimately awarded to each party in the final judgment of divorce was of equal value. Moreover, while plaintiff was awarded all rights in his SRSP account, which was valued at approximately $68,000, defendant received the marital home, which, together with her award of all rights to her own retirement accounts, totaled an award of more than $68,200 in marital assets. Division of the parties' personal debt, of which each party was ordered to keep all debt in their own name, was also relatively equal.[9] Accordingly, because defendant failed to provide evidence to support that plaintiff could bear the expense of the action while she could not, and because she was left in a situation comparable to plaintiff's position, it was not an abuse of discretion for the trial court to refuse to award her attorney fees on the basis of the parties' relative financial situations.

We similarly find no error in the trial court's failure to award defendant attorney fees on the ground that she was forced to incur additional expenses as a result of unreasonable conduct by plaintiff. *Milligan*, *supra*. Although defendant asserts that plaintiff concealed assets and income during the first suit, thereby forcing her to incur the expense of depositions to discover such information, there is no evidence in the record to support that depositions were in fact required for this purpose, or that defendant was forced to incur expenses that she would not otherwise have incurred.[10] See *Hawkins v Murphy*, 222 Mich App 664, 669; 565 NW2d 674

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[9] Although defendant was also ordered to retain a joint debt of $6061, ultimately the division of personal debt was nearly equal, with defendant retaining responsibility for $13,125 in personal debt, while plaintiff retained responsibility for $13,428 of debt incurred by the parties.

[10] While defendant asserts that the depositions were also necessary to uncover plaintiff's
(continued…)

(1997). There is similarly no evidence indicating that defendant incurred additional fees or expenses as a result of plaintiff having filed his own complaint after stipulating to a dismissal of the divorce complaint originally filed by defendant. Indeed, defendant acknowledges that the parties stipulated to her being permitted to raise all issues raised in the previous action and to the use of the depositions taken during the prior suit.

Moreover, even assuming that the circumstances alleged by defendant warrant an award of attorney fees, we note that while the trial court declined to expressly award defendant attorney fees, it appears to have designed its property award to account for any fault or other wrongdoing by plaintiff. As previously noted, the trial court awarded defendant the marital home without any direct payment to plaintiff for his share of the equity, leaving plaintiff with no ready source of funds from which to directly draw for the purchase of a new home. In addition, defendant was permitted to keep the remainder of the couple's comic book collection, which defendant believed to be quite valuable, as well as a number of heirlooms sought by plaintiff in the divorce, without any credit to plaintiff. Under these circumstances, we do not conclude that the trial court abused its discretion in denying defendant's request for attorney fees.

V. Disqualification of the Trial Judge

Finally, defendant argues that the trial judge should be disqualified from presiding over any further proceedings in this matter. In doing so, defendant asserts that disqualification is warranted because the trial judge demonstrated prejudice and favoritism in its rulings, as evidence by his choice of asset valuation dates and failure to invoke sanctions against plaintiff for noncompliance with the financial discovery requirements of the trial court's orders. We disagree.

Because defendant failed to file a motion in the trial court requesting disqualification of the trial judge, this issue has not been preserved for appeal. See *Meagher v Wayne State University*, 222 Mich App 700, 725; 565 NW2d 401 (1997). Nonetheless, even were this issue preserved, a review of the record fails to disclose evidentiary support for defendant's claim of judicial bias, nor does it reveal a deprivation of due process.[11]

Pursuant to MCR 2.003(B)(1), a trial judge who cannot impartially hear a case because of personal bias or prejudice for or against a party must be disqualified. However, a trial judge is presumed to be impartial. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210

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adulterous affair, counsel for plaintiff informed the trial court that the depositions of plaintiff and his girlfriend were unnecessary because plaintiff had already admitted to having an affair, and that these were conducted simply to antagonize plaintiff and to permit defendant to look into the face of the woman with whom plaintiff had an affair.

[11] Even where actual bias or prejudice cannot be shown, the constitutional right to due process requires disqualification in "extreme cases," i.e., where "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Cain v Dep't of Corrections*, 451 Mich 470, 498; 548 NW2d 210 (1996), quoting *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975). Here, however, the facts do not demonstrate an "extreme case" supporting a due process claim of disqualification.

(1996). Here, defendant has failed to overcome this presumption by showing actual and personal prejudice or bias on the part of the trial judge. *Id*. The trial court's opinions and rulings do not demonstrate any favoritism toward plaintiff or any antagonism toward defendant. As discussed above, the property division was both fair and equitable in light of all the circumstances, and the trial court acted within its discretion in choosing the time for valuation of the marital assets. In any event, repeated rulings against a party are alone insufficient to demonstrate bias requiring disqualification. *Id*. at 496. Moreover, as previously noted, defendant, having never formally raised the discovery violations before the trial court, should not now be heard to complain of the trial court's failure to enforce its orders. Accordingly, we find no basis to disqualify the trial judge from continuing to oversee this matter.

We affirm.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Henry William Saad